IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GREGORY LYNN JORDAN, Appellant.	)))))))))	No. 63974-9-I DIVISION ONE UNPUBLISHED OPINION FILED: July 26, 2010

Spearman, J.--During Gregory Jordan's trial for possession of cocaine and driving under the influence of drugs, the trial court denied defense motions for substitute counsel and for a mistrial based on juror misconduct. Jordan contends the court failed to conduct an adequate inquiry into both matters and therefore abused its discretion in denying the motions. Because we conclude the court's inquiries were adequate, and because Jordan's remaining claims are either not reviewable or lack merit, we affirm.

FACTS

On February 16, 2008, Trooper Dan McDonald of the Washington State Patrol responded to a 911 call reporting a possible drunk driver. McDonald located a car matching the caller's description and followed it. The car crossed the fog line twice and the skip line three times before McDonald stopped it.

After approaching the car, McDonald noticed a pipe with burned residue

on it lying on the driver's floorboard. The driver, Gregory Jordan, appeared "very drowsy," had "extremely droopy eyes," his speech was "slow and slurred," and he had an extremely dry mouth. McDonald did not detect the odor of alcohol.

When asked to perform field sobriety tests, Jordan "walked very slow and was very unsteady on his feet." He swayed four inches during a balance test and estimated that thirty seconds had passed after only four seconds. A horizontal nystagmus test indicated that Jordan was not under the influence of a central nervous system depressant.

Based on his observations, McDonald concluded that Jordan was not under the influence of alcohol but was "extremely impaired." He asked Jordan if he had used any drugs. Jordan replied that he had taken "Methadone and a bunch of other drugs."

McDonald arrested Jordan and found cocaine, four prescription bottles, syringes, and pieces of burnt glass on his person. He found three more prescription bottles and the pipe he had previously observed in a search of the car. Two of the prescription labels were written for narcotics. McDonald read Jordan his Miranda[1] warnings twice. He also read him an implied consent warning. When asked if he would submit to a blood test, Jordan said "hell no man." He admitted taking Methadone, Clonidine, Oxycodone, and three other medications in the preceding 24 hours.

Prior to trial, Jordan's counsel moved to withdraw. He explained that he

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

had been appointed after Jordan's previous attorney withdrew and that he had represented Jordan in a prior case. He told the court that communication with Jordan broke down "within the first 25 seconds." He said that "communications did break down, will break down, and will probably not be productive, by any means, with Mr. Jordan." The court then engaged in the following colloquy:

> THE COURT: You know, it's going to happen with any lawyer. Mr. Jordan doesn't want to cooperate. That's not ineffective assistance of counsel; that is misconduct by a client. So I don't really want to discharge you. And I think I told him that if there was a conflict again, that he'd have to represent himself, because there wouldn't be any more choice.
>
> MR. JORDAN: (Inaudible). I can't say nothing about this. I see, yeah, remind me (inaudible).
>
> THE COURT: No, go ahead, Mr. Jordan.
>
> MR. JORDAN: As a matter of fact, I'm supposed to be in mental health court, and not this court, is number one; and number two, there's no way possible I can go to trial with this attorney. I had him before –
>
> THE COURT: Well, you said that about the last attorney.
>
> MR. JORDAN: No, I had him before. And I remember the last time we had a problem. And we going to have that problem again. There's no way possible I can go with him. The attorney I had before him would've been better than him.
>
> THE COURT: So are you –
>
> MR. JORDAN: So I'm just realizing this guy (inaudible)–
>
> THE COURT: Are you going to represent yourself? Is that your intent?
>
> MR. JORDAN: … If I have to, [I will] try and represent myself … [L]ast time I seen him, he said he'll be down to see me right after I'd seen you. He just came last night. That was two weeks ago. I had him before. I remember who he was. He sent me to the joint before on something. …
>
> THE COURT: Oh.
>
> MR. JORDAN: We had a breakdown then. And we're going to have an – even a worser breakdown now.
>
> I've been talking to the mental health people; I'm supposed to be in mental health court. They want to talk to my attorney; but I didn't see him till late last night. And I just remembered, after he came aboard, who he was. And I cannot – I can't go to court with him. There's no way possible. I got a lot of stuff I needed done by

> attorney. I never seen him till last night. So we couldn't possibly (inaudible) –
>
> THE COURT: Mr. Jordan, nobody will satisfy your –
> MR. JORDAN: Anybody'll –
> THE COURT: No.
> MR. JORDAN: -- satisfy me better than him.
> THE COURT: No.
> MR. JORDAN: I'll take [my former counsel] back –
> THE COURT: No.
> MR. JORDAN: -- before I go to court with him. I been in court with him before.

The court also asked the prosecutor for her recommendation. She pointed out that Jordan's current counsel was actually his third, but admitted that she did not know why his first attorney withdrew. The court then denied the motion to withdraw, stating: "I know [Jordan's prior counsel] said that Mr. Jordan refused to get along with him; and that's what we've got here again."

Jordan subsequently moved to suppress his statements to Trooper McDonald and his refusal to submit to a blood test. The court ruled that because the State had presented no evidence regarding Jordan's understanding of his rights, his post-arrest statements, though voluntary, were inadmissible and could be used only for impeachment purposes. The court also ruled, however, that the fact that Jordan refused the blood test was admissible.

During trial, Jordan told the court that a juror had been sleeping and requested a mistrial. The prosecutor suggested the court ask the juror whether there were any problems that would make it difficult for her to stay awake during the rest of the case. The court then denied the mistrial motion, stating:

> I certainly observed Juror No. 9 doing that. She would catch herself, after closing her eyes just for a second or two, and would seem to stay awake and be paying attention for a period of time, and then would occasionally do the same thing all over again.

> . . .
> I'm not going to grant the motion for mistrial now; I don't believe there's sufficient basis for it.

The jury convicted Jordan as charged. He appeals.

DECISION

Jordan first contends he was denied a fair trial when the court failed to question Juror 9 about her sleepiness during Trooper McDonald's testimony.[2] Citing RCW 2.36.110 and CrR 6.5, he argues that, "[w]here there is an allegation of juror misconduct, the trial court is obligated to investigate the alleged misconduct and determine whether a party is prejudiced." Neither the statute nor the court rule required additional investigation by the court in this case.

RCW 2.36.110 governs the removal of unfit jurors and provides in pertinent part:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

Similarly, CrR 6.5 provides that, "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties[,] the court shall order the juror discharged." The statute and court rule place an "obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). They do

[2] "The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

not, however, create obligations regarding the investigation of alleged misconduct. Jorden, 103 Wn. App. at 228-29. Rather, the investigation and resolution of misconduct allegations are discretionary with the court. Id. at 229 ("[T]he trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party."); Turner v. Stime, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009) ("[A] trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct.").[3] There was no abuse of discretion here.

The trial court observed juror 9 during trial and stated that she only occasionally closed her eyes "just for a second or two." She appeared to be "awake and … paying attention" the rest of the time. Because the court observed the alleged misconduct, and because questioning the juror could have put her in an adversarial position with a party or other jurors, Jorden, 103 Wn. App. at 228-29, the court did not abuse its discretion in electing to resolve the issue without questioning the juror.

Next, Jordan contends the prosecutor committed reversible misconduct by repeatedly violating the pretrial ruling excluding his post-arrest statements. Specifically, he claims the prosecutor violated the ruling by asking Trooper McDonald whether Jordan understood his rights, asked for an attorney, expressed confusion about his rights, or expressed intent to exercise his rights.

[3] A federal case cited by Jordan, United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983), is distinguishable. See Jorden, 103 Wn. App. at 227-28 (distinguishing Barrett).

We conclude any misconduct based on violations of the pretrial ruling is not reviewable.

Absent an objection, alleged prosecutorial misconduct is not reviewable unless it was so flagrant and ill-intentioned as to be incurable. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993). In this case, defense counsel did not object to three of the questions, and his objection to the fourth did not involve the court's pretrial ruling. Accordingly, any violations of the ruling are reviewable only if they meet the flagrant and ill-intentioned standard. They do not.[4]

Although the court's oral ruling, which was incorporated into its written ruling, did refer broadly to "any statements made at the station," the hearing, arguments, and written ruling focused exclusively on the admissibility of three incriminating statements. None of those statements were elicited by the prosecutor's questions, and only one of the prosecutor's questions elicited any testimony concerning a post-arrest statement. In these circumstances, any violation of the pretrial ruling was not so flagrant and ill-intentioned as to be incurable. Review of this claim is therefore precluded.

Jordan also contends the prosecutor's questions "repeatedly commented on and drew attention to Jordan's silence in response to police questioning." The record does not support this contention.

Our courts distinguish between comments on, and mere references to, a defendant's silence. State v. Pottorff, 138 Wn. App. 343, 346-47, 156 P.3d 955

[4] Although we conclude any misconduct does not meet the flagrant and ill-intentioned standard, we reiterate the Supreme Court's admonition that "cavalier violation" of pretrial rulings will not be condoned. State v. Easter, 130 Wn.2d 228, 242 n.11, 922 P.2d 1285 (1996).

(2007); State v. Slone, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006). A comment on silence occurs when a witness or prosecutor mentions a defendant's right to silence and the State uses the defendant's silence as evidence of guilt See State v. Lewis, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996); State v. Curtis, 110 Wn. App. 6, 9, 13, 37 P.3d 1274 (2002) (officer's testimony that after reading defendant his rights, defendant refused to talk and asked for attorney was comment on silence); State v. Romero, 113 Wn. App. 779, 785, 54 P.3d 1255 (2002) (testimony that "I read him his Miranda warnings, which he chose not to waive, would not talk to me" was a comment on silence). A reference to silence occurs when a witness or prosecutor references actions or statements that the jury could interpret as an attempt to invoke the right to silence. State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999) (officer's testimony that defendant said he would produce a written statement after discussing the matter with his attorney was an indirect reference to silence); Pottorf, 138 Wn. App. at 347.

Here, there was no comment on Jordan's right to silence. Neither the prosecutor nor Trooper McDonald indicated that Jordan exercised his right to silence or refused to talk. Nor did they reference conduct that could reasonably be interpreted as an attempt to invoke the right to silence. And even if such an interpretation could reasonably be made, the error is not reversible absent a showing of prejudice. State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008). Jordan cannot show prejudice. Any reference to silence was oblique and was not repeated in closing argument. In addition, the State's case against Jordan

was extremely strong. His erratic driving, slurred speech, drowsy demeanor, failed sobriety tests, blood test refusal, and possession of drugs, drug paraphernalia, and prescription bottles strongly supported a finding that he drove while under the influence of drugs. Any error was harmless.

Finally, Jordan contends the court abused its discretion in denying his counsel's motion to appoint substitute counsel.[5] We disagree.

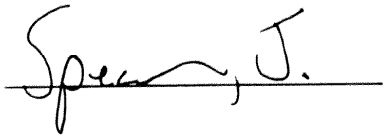
In reviewing a decision denying new counsel, we consider (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). It is undisputed that Jordan's motion was timely. It is also undisputed that defense counsel and Jordan reported a complete breakdown in their communications and that "an irreconcilable conflict, or a complete breakdown in communication" constitute good cause to appoint substitute counsel. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). However, a breakdown in communication that results from the defendant's refusal to cooperate does not constitute good cause. State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007). The record indicates that Jordan's first attorney withdrew, albeit for unknown reasons, and that Jordan refused to cooperate with his second attorney. Given this history, the fact that communication with his third attorney broke down within 25 seconds supports the trial court's conclusion that the

[5] Whether a defendant's dissatisfaction with counsel warrants the appointment of new counsel is a matter within the trial court's discretion. In re Stenson, 142 Wn.2d at 732; State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991).

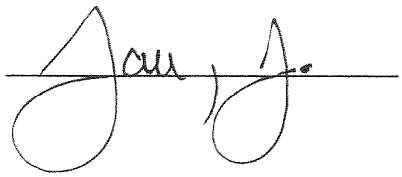
breakdown was also due to Jordan's failure to cooperate. Tellingly, defense counsel did not dispute that conclusion despite ample opportunity to do so.

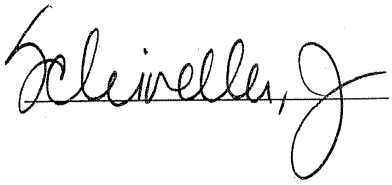
Jordan argues, however, that the court failed to conduct an adequate inquiry into the reasons for his conflict with his third attorney. We disagree. "[A] trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully." Schaller, 143 Wn. App. at 271 (citing State v. Varga, 151 Wn.2d 179, 200-01, 86 P.3d 139 (2004); In re Stenson, 142 Wn.2d at 731). In this case, the trial court gave Jordan, defense counsel, and the prosecutor a full and fair opportunity to weigh in on the issue. The court conducted an adequate inquiry and did not abuse its discretion in denying the request for substitute counsel.[6]

Affirmed.



WE CONCUR:





[6] For the reasons set forth in Schaller, 143 Wn. App. at 269-70, and in light of the trial court's lengthy colloquy and Jordan's conflicts with prior counsel, Jordan's reliance on United States v. Nguyen, 262 F.3d 998 (9th Cir. 2001), is misplaced.